Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

No. 90-1843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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August 14, 1991

The Daily Record Co., Baltimore, MD 21202

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The Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("Blue Cross"), respectfully submits this Reply in support of its request that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

A. *The Decision of the Court Below Conflicts With Well-Established Precedents of this Court And Threatens The Right of State Courts to Determine their Own Jurisdiction.*

The decision below conflicts with a unanimous and impressive array of authority from this Court, other courts, and distinguished scholars. Review should be granted because the holding calls into question a well-settled rule accommodating res judicata and federal supremacy. The holding, therefore, threatens vital *federal* interests by narrowing to the vanishing point the right of collateral attack upon a judgment, even where allowing that judgment to stand would undercut the congressional mandate that there be exclusive federal jurisdiction. Ironically, the court below achieved that result by threatening vital *state* interests, ruling astonishingly that under certain circumstances state courts may not even determine their own jurisdiction.[1]

The Decision Threatens to Eliminate the Right of Collateral Attack.

The availability of collateral attack to protect areas of special and exclusive federal concern from unwarranted state court intrusion has been clear since *Kalb v. Feuerstein*, 308 U.S. 433 (1940). This right is a well-recognized exception to the general rule of *Stoll v. Gottleib*, 305 U.S. 165, 173 (1938), that subject matter jurisdiction, once litigated, cannot be the basis of a collateral attack. The *Kalb* exception, reaffirmed

[1] Respondents state that Blue Cross is "in its eleventh court in this dispute" and that "five of these courts" have rejected Blue Cross' efforts collaterally to attack the Florida judgment. (Respondents' Brief in Opposition at 2.) This rhetorical flourish ignores the undisputed fact that only the court below (and the district court which it affirmed) have ever ruled upon the issue presented here: whether Blue Cross can collaterally attack the Florida judgment after exhaustion of direct appeals.

in *Durfee v. Duke*, 375 U.S. 106 (1963), has been universally adopted by leading scholars and judges, *see, e.g., Restatement (Second) of Judgments* §12(2) (1982); 13A Wright, Miller & Cooper, *Federal Practice & Procedure* §3536 (rev. ed. 1984); *Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941 (Reg. Rail Reorg. Ct. 1976) (Friendly, Wisdom, & Thomsen, JJ.), *cert. denied*, 429 U.S. 1095 (1977). The present collateral attack should be permitted because ERISA is quintessentially an area of mandatory federal concern, involving not only exclusive federal jurisdiction, but also "super preemption," *see Connecticut General Life Insurance Co. v. Brown*, 934 F.2d 1193, 1196 (11th Cir. 1991), citing *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987).

The Decision Threatens the Right of Courts to Determine Their Own Jurisdiction.

A fundamental error made by the court below is its holding that collateral attack is "only" available where a state court is *not permitted* to determine its own jurisdiction over a controversy but does so anyway. Collateral attack, in other words, is only possible where the "question of which jurisdiction, state or federal, should control *was intended to be resolved solely by a federal court.*" (App. A at 4-5; emphasis in original.)

This distinction simply *does not exist*. This Court recognized long ago that *any* court—state or federal—can and must always have the right to determine in the first instance whether it has jurisdiction:

> Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.

Texas & Pacific Ry. Co. v. Gulf, Colorado and Santa Fe R.R. Corp., 270 U.S. 266, 273 (1926). *Stoll* itself recognizes the rule:

> A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.

305 U.S. at 171 (footnote citing *Texas & Pacific Ry. Co.* omitted.) *See also Harmon v. Brucker*, 355 U.S. 579, 582 (1958); *United States v. United Mine Workers of America*, 330 U.S. 258, 289 & 292 n.57 (1947) ("... a court has jurisdiction to determine its own jurisdiction," and its decision "binds the parties as a thing adjudged" except where [as here] the court has usurped jurisdiction).

Thus, the holding below that collateral attack is available *only* when the state court has no right to determine its own jurisdiction flatly conflicts with repeated holdings of this Court. That rule, if allowed to stand, threatens the proper functioning of our judicial system. A federal court must have the authority to hear a collateral attack under the *Kalb* rule when important federal interests such as ERISA are at stake.

B. *The Decision of the Court Below Conflicts With Governing Principles in Other Circuits.*

The Circuit Courts of Appeal are Unanimous That a Court Must Have the Right to Determine its Own Jurisdiction.

The rationale which underlies the holding of the court below—that a state court may be denied the right to determine its own jurisdiction—has been rejected by Courts of Appeal across the country, including the Fourth Circuit itself. "It goes without saying that a court has jurisdiction to determine its own jurisdiction." *Rumbaugh v. Winifrede Railroad Co.*, 331 F.2d 530, 541 (4th Cir.), *cert. denied*, 379

U.S. 929 (1964). "Any court *necessarily* has jurisdiction to inquire into its own jurisdiction." *Greylock Glen Corp. v. Community Savings Bank*, 656 F.2d 1, 3 (1st Cir. 1981) (emphasis added).[2] Review by this Court, therefore, is necessary to resolve the conflict among the Circuits on this fundamental point.

C. *Wright, Miller & Cooper Expressly Rejects, Rather than Supports, the Decision Below.*

The court below relied upon the treatise by Wright, Miller & Cooper at §3536, *in support of its view* (App. A at 5). That section, however, supports Petitioners:

> [W]hen a federal statute has vested exclusive jurisdiction of a particular type of case in the federal courts, the finding by a state court that it has jurisdiction over such a case will not preclude collateral attack upon the judgment rendered in the state court.

Id. at pp. 539-40; *see also Restatement (Second) of Judgments* §12(2) (1982), providing similarly that a judgment may be vacated on collateral attack if "[a]llowing the judgment to stand would substantially infringe the authority of a tribunal or agency of government . . ." (citing, *inter alia*, *Kalb*, and noting that the *Restatement (Second)* relies also upon the teaching of *Stoll*). *Id.* at 125, 127.

That Wright, Miller & Cooper *refutes* the decision below is demonstrated by its plain language, by its reliance upon the

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[2] *See also Ilan-Gat Engineers, Ltd. v. Antiqua International Bank*, 659 F.2d 234 (D.C. Cir. 1981); *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976); *In re Trimble Co.*, 479 F.2d 103, 109 (3d Cir. 1973); *Atlantic Las Olas, Inc. v. Joyner*, 466 F.2d 496, 498 (5th Cir. 1972); *Gregory v. Tarr*, 436 F.2d 513, 515-16 (6th Cir. 1971); *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969); *James Talcott, Inc. v. Collier*, 357 F.2d 23, 25 (5th Cir. 1966) ("it is a *fundamental rule* that a court has jurisdiction to determine jurisdiction.") (emphasis added); *Johnson v. MacCoy*, 278 F.2d 37, 40 (9th Cir. 1960).

Restatement (Second), and by its reliance on *Consolidated Rail*, in which the Special Railroad Court permitted collateral attack in a case indistinguishable in principle from the present case. It is further clear in the opinion of the Seventh Circuit in *Lambert*. There, the Court held that "a court has jurisdiction to determine its jurisdiction," 536 F.2d at 1185, but that such a decision can be collaterally attacked

> on the grounds of certain public policies which prevail over the doctrine of *res judicata*. *See* Wright & Miller, *supra* [referring to §3536].

Id. Thus, as *Lambert* recognizes, Wright, Miller & Cooper recite the rule that—as in the present case—a state court always has jurisdiction to determine its own jurisdiction but—as in the present case—that decision is subject to collateral attack "on grounds of certain public policies which prevail over the doctrine of *res judicata*." *Id.*[3]

CONCLUSION

There is a "critical breaking point .. beyond which no language can be forced." *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 982 (S.D.N.Y. 1917) (L. Hand, J.). The court below, perhaps in an effort to achieve a sympathetic result, has proceeded beyond the "breaking point." It has endangered the important right of collateral attack, established by this Court to preserve and protect extraordinary *federal* interests, of which ERISA is a prime example. Moreover, in order to justify denying collateral attack at the very point at

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[3] Respondents mistakenly rely on *Allegheny Corp. v. Kirby*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966). *Allegheny* (which addressed an issue raised for the first time in a reply brief on rehearing), however, was *rejected* by Wright, Miller & Cooper. It was cited by them, in the same section discussed above, with the telling reference *"[b]ut compare."* §3536 at 539-40.

which all authorities recognize it is most necessary, the court propounded a new rule, recognized nowhere, which challenges the very right of a *state* court to determine its own jurisdiction.

This decision cannot be allowed to stand. The petition for a writ of certiorari should be granted.

Dated: August 14, 1991

Respectfully submitted,

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1. I am one of the counsel for Petitioner.

2. I hereby certify that, on this August 14, 1991, two copies of the Reply in Support of Petition for a Writ of Certiorari were served by mail, postage prepaid, upon Larry S. Stewart, Esquire, Suite 1900, 44 West Flagler Street, Miami, Florida 33130, counsel for Respondents.

Allan P. Hillman